Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12-21-1991
KC VOHRAH J
22 DECEMBER 1994

Tort *— Negligence — Professional negligence — Solicitors — Negligently advising bank to release loan to borrower when charge could not be registered due to third party caveat — Whether any loss caused to bank as money was credited to borrower's current account — Whether bank required to mitigate loss by suing borrower or removing caveat*

Banking *— Banker and client — Overdraft account — Loan released upon negligent advice from solicitors — Whether bank suffers loss if loan used to reduce borrower's overdraft — Whether money becomes property of borrower when credited to borrower's account*

The appellants, who were solicitors and partners of a firm ('the solicitors'), were retained by the respondent ('the bank') as its solicitors in respect of a loan transaction for RM60,000. On 27 June 1987, the solicitors advised the bank to release the loan to the borrower as, inter alia, the property which was approved to be charged to the bank was free from encumbrances and the charge had been presented for registration. On 8 July 1987, however, the solicitors informed the bank that the property was caveated. Unfortunately, acting on the solicitors' earlier advice, the bank had already released the RM60,000 to the borrower.

The bank sued the solicitors for negligence and obtained summary judgment in the sessions court for RM66,859.40 and interest at 11%pa on monthly rests from 1 June 1988 to realization. There was no dispute that the solicitors had been negligent but they appealed, arguing that no loss had been suffered by the bank as the loan had been credited to the current account of the borrower to reduce its overdraft. In the meantime, counsel for the bank conceded that RM996 as the legal fees should have been deducted from the RM60,000, leaving RM59,004 as the judgment sum with interest at 11%pa from the date of release of the loan to the date of judgment and thereafter at 8%pa to the date of realization.

Held, dismissing the appeal but reducing the judgment sum and interest as conceded by counsel for the bank:

(1) The amount was clearly released as a loan and the fact that it reduced the borrower's overdraft was irrelevant. Once the amount was released to the account of the borrower, the money ceased to be the money of the bank and became the money of the borrower.

(2) If the charge had been registered, the bank would have been entitled to recover the amount by the sale of the property under

s 256 of the National Land Code 1965 and that was the recoverable loss which could have been reasonably foreseen by the solicitors. A

(3) The solicitors could not say that the bank should have mitigated damages by suing the borrower or by taking proceedings to remove the caveat. There was no reason why the bank, which had relied on the advice of the solicitors, should be put to extra expense and protracted legal proceedings against the borrower. B

[**Bahasa Malaysia summary**

Perayu, yang merupakan peguamcara dan rakan kongsi sebuah firma ('peguamcara itu'), telah diambil sebagai peguamcara responden ('bank itu') berkaitan dengan suatu transaksi pinjaman untuk jumlah RM60,000. Pada 27 Jun 1987, peguamcara itu telah menasihati bank itu supaya melepaskan pinjaman tersebut kepada peminjam kerana, antara lain, harta yang telah diluluskan untuk digadai kepada bank itu bebas daripada bebanan dan gadaian itu telah diserahkan untuk pendaftaran. Bagaimanapun, pada 8 Julai 1987, peguamcara itu telah memberitahu bank itu bahawa harta tersebut telah dikaveat. Malangnya, bank itu telah bertindak mengikut nasihat peguamcara yang terdahulu dan telahpun melepaskan jumlah RM60,000 kepada peminjam. C D

Bank itu telah mendakwa peguamcara itu atas kecuaian mereka dan mendapatkan penghakiman terus di mahkamah sesyen bagi jumlah RM66,859.40 dan faedah pada kadar 11% setahun dengan kiraan bulanan ('monthly rests') dari 1 Jun 1988 hingga penyelesaian. Tidak dipertikaikan bahawa peguamcara itu cuai tetapi mereka telah membuat rayuan, dan berhujah bahawa bank itu tidak mengalami sebarang kerugian kerana pinjaman itu telah dikreditkan ke dalam akaun semasa peminjam untuk mengurangkan overdrafnya. Sementara itu, peguambela bagi pihak bank telah mengaku bahawa jumlah RM996 sebagai fee guaman seharusnya ditolak daripada jumlah RM60,000, meninggalkan RM59,004 sebagai jumlah penghakiman dengan faedah pada kadar 11% setahun dari tarikh pinjaman itu dilepaskan hingga tarikh penghakiman dan seterusnya pada 8% setahun hingga tarikh penyelesaian. E F G

Diputuskan, menolak rayuan itu tetapi mengurangkan jumlah penghakiman dan kadar faedah seperti yang diakui oleh peguambela bank itu: H

(1) Memanglah jelas bahawa jumlah tersebut telah dilepaskan sebagai suatu pinjaman dan hakikat bahawa ia telah mengurangkan overdraf peminjam tidak relevan. Sebaik sahaja jumlah itu dilepaskan ke dalam akaun peminjam, wang itu tidak lagi menjadi wang bank itu tetapi menjadi wang peminjam. I

(2) Jika gadaian itu telah didaftarkan, bank itu akan berhak mendapatkan balik jumlah itu melalui jualan harta itu di bawah s 256 Kanun Tanah Negara 1965 dan kehilangan itu boleh

A didapatkan balik kerana ia boleh semunasabahnya diramalkan oleh peguamcara itu.

(3) Peguamcara itu tidak boleh berkata bahawa bank itu sepatutnya mengurangkan ganti ruginya dengan mendakwa peminjam itu atau dengan mengambil prosiding untuk membatalkan kaveat B itu. Tidak ada sebab mengapa bank itu, yang telah bergantung pada nasihat peguamcara itu, harus menanggung perbelanjaan tambahan dan prosiding guaman yang berpanjangan terhadap peminjam itu.]

[*Editorial Note*: The appellants have appealed to the Court of Appeal C vide Civil Appeal No B–04–12–94.]

Notes

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed) paras 357–375; [1989] Mallal's Digest 1498, 1507; [1990] D Mallal's Digest 1180–1181, 1195; [1991] Mallal's Digest 1963; [1992] Mallal's Digest 1653; [1993] Mallal's Digest 1289–1290.

Cases referred to

Dummer v Brown [1953] 1 QB 710; [1953] 1 All ER 1158; [1953] 2 E WLR 984 (refd)
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 (folld)
Pilkington v Wood [1953] Ch 770; [1953] 2 All ER 810; [1953] 3 WLR 522 (refd)

Legislation referred to

F National Land Code 1965 s 256
Subordinate Courts Rules 1980 O 14 r 21, O 26A

Paul Kwong (*Azman, Davison & Co*) for the appellants.
V Sujata (*Ong Kok Bin & Co*) for the respondent.

G

KC Vohrah J: This is a sessions court matter which was taken up on appeal before me.

A company, Denson & Co ('the borrower'), applied to the respondent bank ('the bank') for a loan of RM60,000 to be secured by way of legal H charge over a piece of property held under PT(M) 421 Lot 7975, Mukim Klang.

The appellants, solicitors and partners of a firm ('the solicitors'), were retained by the bank on 27 February 1987 as their solicitors in respect of the loan transaction.

I On 27 June 1987, the solicitors advised the bank that the documents in respect of the loan had been completed and that the property which was approved to be charged to the bank was free from encumbrances and that the charge had been duly presented for registration. The solicitors further advised the bank to release the loan to the borrower.

On 8 July 1987, however, the solicitors informed the bank that the said property was actually caveated and was not free from encumbrances. But five days earlier acting on the earlier advice from the solicitors, the bank had released the RM60,000 to the borrower. A

The bank sued the solicitors for negligence and claimed damages in the sum of RM66,859.40 (made up of the amount released and interest on the sum amounting to RM6,859.40) and further interest at the rate of 11%pa on monthly rests from 1 June 1988 till the date of payment. B

While the bank claimed the sum of RM60,000 was a loan that was released while acting on the advice of the solicitors, the solicitors disputed that the sum of RM60,000 was a loan to the borrower. They alleged that the said amount was credited into another account of the borrower which reduced the indebtedness of the borrower to the bank. There were other peripheral matters that were also disputed. C

The bank in the Sessions Court at Klang applied for the statement of defence of the solicitors to be struck out under O 14 r 21 of the Subordinate Courts Rules 1980 ('the Rules') for not disclosing a reasonable defence, for being frivolous and vexatious and for being an abuse for the process of the court. Alternatively, the bank applied for liberty to enter final judgment under O 26A of the Rules. D

The judge of the sessions court gave judgment to the bank under O 26A as prayed for. E

In the appeal before me, there was no dispute that the solicitors had been negligent but counsel for the solicitors argued that no loss had been suffered by the bank. In the meantime, counsel for the bank conceded that the sum of RM996 as the legal fees should have been deducted from the RM60,000 released, thus leaving a balance of RM59,004 as the judgment sum with interest at 11%pa from 3 July 1987 up to the date of judgment in the sessions court and thereafter at 8%pa till date of realization. F

The question is, did the bank suffer loss? If so, how much was the loss?

The loan that was approved for the borrower was for 'banking facilities under your Current Account No 1333–03791–1' (see the letter of approval of the bank, CTZ1, at page 67 of the appeal record). The bank, on 3 July 1987, released the sum of RM60,000 less the sum of RM996 (being legal fees payable to the solicitors) (see the affidavit of the manager of the bank's sub-branch at Port Klang, Yap Kuan Bon, at para 5, p 63 of the appeal record) to the borrower. This amounted to RM59,004 and was credited into the current account of the borrower, Account No 1333–03791–1 (see the copy of the credit advice at p 70 of the appeal record). G H

It is difficult to see how the solicitors can deny that the bank had released the sum of RM59,004 as a loan. They averred (see para 5 of the affidavit of the second defendant, one of the five solicitors) that the bank credited that sum to the current account of the borrower (Account No 1333–03791–1) 'to reduce the borrower's overdraft standing at RM57,987.54 as at 3 July 1987 thereby creating a credit of RM1,016.46 as at 3 July 1987'. What has to be noted is that the sum was released to the I

same account number which was stipulated in the bank's letter of approval for the loan to the borrower (see CTZ1 at p 67 of the appeal record), ie Account No 1333–03791–1. The sum was clearly released as a loan and that the said sum reduced the borrower's overdraft standing is quite irrelevant. Once the said sum was released to the account of the borrower which was stipulated in the bank's letter of approval, the money ceased to be the money of the bank and it became the money of the borrower.

It is not disputed that the borrower defaulted in the repayment of the loan. The bank complained to the solicitors of the default by the borrower on 11 November 1987 (see the letter of the bank to the solicitors dated 11 November 1987 exhibited to the affidavit of the second defendant solicitor, at p 90 of the appeal record). The civil action was filed on 4 October 1988 and clearly the loan remained unpaid at the date for final judgment before the judge of the sessions court.

The loan that was advanced was supposed to have been secured against a charge on the property and had been released on the negligent advice of the solicitors that the charge had been duly presented for registration. If the charge had been registered, the bank would have been entitled to recover the loan amount by the sale of the said property under s 256 of the National Land Code 1965 and this was surely the recoverable loss which could have been reasonably foreseen by the solicitors.

As is stated in *Charlesworth and Percy on Negligence* (8th Ed) at p 654, the broad and fundamental principle as to damages remains as stated over a century ago by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 who opined that the measure of damages was 'that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not suffered the wrong for which he is now getting his compensation or reparation'. As has been pointed out by the authors in this regard, it matters not whether the claim against the negligent solicitor is based in contract or tort.

The recoverable loss is that which could reasonably have been foreseen.

It is not for the solicitors to say that the bank should have mitigated damages by suing the borrower for the loan or by taking proceedings to remove the caveat. I cannot see the bank as having any standing to take proceedings to remove the caveat. In any event, it is difficult to see why the bank, which in the normal course of banking business prudently relied on the legal device of a charge on the said property to make good any default on a loan and which called for and confidently relied on the advice of the solicitors, but which now as has been admitted by them to be quite wrong advice, should be put to extra expense and protracted legal proceedings to recover the loan amount from the borrower himself if at all any of the said amount can be recovered from the borrower (see, eg *Pilkington v Wood* [1953] Ch 770 at p 777; [1953] 2 All ER 810 at p 813; [1953] 3 WLR 522 at pp 526–527).

In the circumstances, at the end of the hearing, I held that there was no merit in the appeal of solicitors against the decision of the judge of the sessions court giving judgment to the bank under O 26A of the Rules, who

was entitled to enter summary judgment in favour of the bank bearing in mind *Dummer v Brown* [1953] 1 QB 710; [1953] 1 All ER 1158; [1953] 2 WLR 984. However, counsel for the respondent bank has conceded that the sum of RM996 should have been deducted from the sum of RM60,000 and the interest given should have been at 11%pa from 3 July 1987 up to date of judgment in the sessions court and thereafter at 8%pa. I, therefore, allowed the appeal of the solicitors in part. I order the sum of RM996 to be deducted from the sum of RM60,000 awarded by the judge and varied the interest on the decreased amount at 11%pa from the date the loan was released up to the date of judgment in the sessions court and at 8%pa from the date of judgment to the date of realization. I awarded costs to the respondent and made an order for the deposit of the appellant to be applied to the account of costs.

Order accordingly.

Reported by Anne Khoo